BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DWAYNE RUSSELL YOUNG Claimant	)	
VS.	)	
APAC-KANSAS, INC. Respondent	)	Docket No. 1,018,122
AND	)	
INDEMNITY INS. CO. OF NORTH AMERICA Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 1, 2004 Preliminary Decision entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

The ALJ found claimant sustained a compensable injury and authorized Dr. Jeffrey T. MacMillan to "continue supervision of [c]laimant's treatment as needed.[1]

The respondent requests review of this preliminary hearing Order and contends a variety of errors were made on the part of the ALJ. They are: 1) the ALJ exceeded his authority in awarding compensation in the Preliminary Decision dated October 1, 2004; 2) the ALJ erred in finding that the claimant sustained personal injury by accident on the date alleged by the claimant; 3) that the ALJ committed an error in finding that whatever injury sustained by the claimant arose out of and in the course of his employment with the respondent; and 4) that the ALJ erred in finding that the claimant provided timely notice to the employer as required by K.S.A. 44-520.

Highly summarized, respondent concedes a third party non-employee used a 2x2 board to "tap" claimant on the head on April 16, 2004 while the two were at a work site in Miami County, Kansas. Respondent, however, denies that this "tap" could reasonably be

[1] ALJ Order (Oct. 1, 2004) at 2.

viewed as a "personal injury" much less an assault or battery, nor could it have caused the claimant's present claims of ongoing neck, and mid and lower back complaints of pain. Moreover, respondent asserts the intervening automobile accident which occurred on July 15, 2004 is, more probably than not, responsible for claimant's present physical complaints. Respondent denies claimant provided the sufficient specific notice required by K.S.A. 44-520. Finally, respondent contends the ALJ erred in awarding medical compensation to the claimant. Thus, respondent urges the Board "to correct this travesty by reversing and vacating the Preliminary Decision and finding this claim non-compensable for the reasons set forth above."[2]

Claimant maintains there is sufficient evidence to conclude that he was injured while performing his job duties on April 16, 2004. Claimant argues that the individual who struck him with the board was essentially a supervisor, although he was admittedly employed by the company retained to oversee the construction project and not by respondent. Claimant further argues that even if the accident happened out of humor, what he characterizes as a social event, it was still within the course of his employment. Claimant contends that timely notice was given as the foreman actually witnessed the incident and was told by the claimant afterwards that he was hurting. Accordingly, claimant requests that the Board affirm the ALJ's decision and if within the Board's power award temporary total disability immediately.

The issues to be decided are as follows:

1. Whether claimant sustained an accidental injury;
2. Whether claimant's accidental injury arose out of his employment with respondent;
3. Whether claimant provided notice as required by K.S.A. 44-520; and
4. Whether claimant has established his entitlement to medical treatment and temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a laborer and was working in Paola, Miami County, Kansas at the junction of 68 and 169 Highways on April 16, 2004. Claimant was working with four other co-workers as well as Scott Johnson who was the supervisor.

In addition, Mark McPherson, an employee of HNTB, was at the site. HNTB is a separate company retained by the State of Kansas to oversee respondent's work on the

[2] Respondent's Brief at 14 (filed Nov. 5, 2004).

project. As an HNTB employee, Mr. McPherson was assigned to be the inspector on this job and it was his responsibility to ensure compliance within all the job requirements. There is evidence within the record that indicates Mr. McPherson can direct respondent's employees to perform certain tasks and jobs as they relate to the project. He is not, however, an employee of respondent, nor is there any evidence to suggest that he has the right to hire or fire any of respondent's employees. Similarly, claimant is not an employee or statutory employee of HNTB as there is no evidence of a principal/subcontractor relationship between HNTB and respondent.

Claimant was assigned to mix up the grout to be used by the other workers. At approximately 2:00 p.m. while sitting on a rock in a sloped area mixing, he inadvertently spilled the water-based mixture. It ran down the hill, spilling on to Mr. McPherson. Claimant testified that he apologized for the mess and continued working. He further testified that "everybody started laughing about him [Mark McPherson] getting wet that was on the job site except for me."[3]

Claimant then says that within 30 seconds of this event, "Mr. McPherson got a stick, come over, and he whacked me up the side of my back and then he slammed it down across the top of my head."[4] According to claimant, the rest of the work crew "just laughed harder about it. They thought it was funny as hell."[5]

Claimant testified the stick Mr. McPherson used was a 2x2 piece of oak that was about four feet long.[6] He further testified that he lost consciousness as a result of the two blows, although his hard hat remained on his head and did not crack,[7] his safety glasses were knocked off,[8] but he did not slump to the ground nor did he lie down or slide down the incline.[9] Claimant knows that his supervisor, Scott Johnson, saw this event because he, too, laughed about it. Afterward, claimant indicates he told Mr. Johnson that he thought he was hurt and Mr. Johnson did nothing.[10]

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[3] P.H. Trans. at 15.

[4] *Id.* at 15.

[5] *Id.* at 16.

[6] *Id.* at 16.

[7] *Id.* at 42.

[8] *Id.* at 41.

[9] *Id.* at 43.

[10] *Id.* at 18.

Claimant worked the rest of the day, approximately another half an hour without further incident, although he testified he continued to experience neck and back pain as he carried a five gallon bucket of water. Claimant spoke with a co-worker, Dustin McClendon, that same day about the event, but made no formal complaint to either his supervisor or anyone else within respondent's company that day.

Claimant testified that he continued to have severe back and neck complaints on the ride home to Leavenworth and into the evening. As April 16, 2004 was a Friday, claimant did not work for two days. He returned to work on Monday, April 19, 2004, and continued to work a few days thereafter until the project was completed. He was laid off as of April 21, 2004. Claimant then sought unemployment, advising the unemployment office that he was prepared and ready to work, although claimant admitted at the preliminary hearing that in retrospect, he believes he was unable to work.[11] Claimant also acknowledges lying to the unemployment office about his job search efforts, telling them he had sought employment when in fact, he had not.[12]

On May 5 or 6, 2004, claimant contacted Dave O'Dell, one of respondent's project superintendents. According to Mr. O'Dell, claimant was seeking employment on a project in Lenexa, Kansas. Mr. O'Dell indicated that he had no work available for claimant at that time. Mr. O'Dell testified that at no time did claimant allege he had been injured on April 16, 2004, nor did he request medical treatment for his alleged injuries. Similarly, claimant did not ask Mr. O'Dell to fill out an accident report for the event of April 16, 2004.

In the meantime, claimant testified that he contacted Dan Jones, the environmental safety manager for respondent, on May 11, 2004. During this conversation, Mr. Jones says claimant told him of the April 16, 2004 accident. Mr. Jones believed claimant was seeking information about Mark McPherson in the hopes of making some sort of claim against him rather than asserting a workers compensation claim against respondent. Mr. Jones indicated he would need to investigate the event as he knew nothing about it. Approximately a week later, the two had a second conversation. During this call Mr. Jones offered claimant some options, including the choice of asserting a workers compensation claim. According to Mr. Jones, claimant did not express a desire to file a claim against respondent and that he did not make any specific request for medical treatment, nor was any offered.

Scott Johnson testified that he was present at the job site on April 16, 2004, and that he saw claimant accidentally spill a bucket of water onto Mark McPherson. He explained that Mr. McPherson stood up and that "he didn't really seem mad, and all I seen him do is tap him [claimant] on the head. He came down pretty hard just like a little tap on the head.

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[11] *Id.* at 48.

[12] *Id.* at 52-53.

It was not like horseplay, just kind of came down, kind of a tap."[13] The single "tap" he witnessed did not knock claimant down to the ground, nor did claimant's hard hat come off. He specifically denied that claimant appeared to lose consciousness following the "tap" on his head.[14] Mr. Johnson testified that he was three to four feet away from claimant when Mr. McPherson approached claimant and there did not appear to be anything wrong with claimant following Mr. McPherson's "tap".[15]

Mr. Johnson doesn't remember speaking with the claimant following this event. To the contrary, Mr. Johnson maintains that he learned that claimant alleged to have been injured by this act from another employee as claimant never told him he was injured.[16] Mr. Johnson also testified that during the next few days of work, claimant was able to perform his normal job duties and did not express any physical complaints.

Two months passed. Claimant remained unemployed and received unemployment insurance. In order to obtain these benefits, claimant indicated he was willing and able to work. He further indicated he was actively searching for work through his union hall.

Then, on June 4, 2004, claimant filed a report with the Miami County Sheriff's Office alleging he was the victim of an aggravated battery at the hands of Mark McPherson. He also signed an E-1 Application for Hearing on June 10, 2004 referencing "three or so" blows to the head and back by Mr. McPherson, an employee of HNTB", but did not file this document with the Division until July 27, 2004.

Claimant did not seek any medical treatment until June 7, 2004, although he maintains that he was trying, on his own, to get Mr. McPherson to provide the treatment. Claimant first sought treatment with Dr. Dorothy Emery, a chiropractor. Two reports she authored were entered into evidence along with some limited records that were generated after July 15, 2004, the date claimant was involved in a subsequent automobile accident.

The first report dated July 19, 2004, indicates claimant "presented at this office on 6-7-04 for injuries sustained on 4-6-04."[17] According to her letter, claimant was initially complaining of severe headaches, neck pain, midback pain and low back pain.[18] Dr.

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[13] *Id.* at 76.

[14] *Id.* at 86.

[15] *Id.* at 87.

[16] *Id.* at 79.

[17] *Id.,* Cl. Ex. 2.

[18] *Id.,* Cl. Ex. 2.

Emery indicated there were "faint bruising lines from the impact of the boards across his back."[19] She recommended ongoing treatment and indicated that while he was progressing, he was not in any condition to work at that time nor for the next 6-8 months.

This report makes no mention of a car wreck in which claimant was struck from behind on July 15, 2004 by another vehicle while on the way for treatment with Dr. Emery. However, on September 16, 2004, Dr. Emery authored another report which indicates that claimant was making "reasonable progress at the time of the car accident on 7-15-04."[20] She further opined that the cervical foam collar claimant was wearing at the time of his wreck (which she had recommended) prevented repeated severe injury to the neck, but not an exacerbation of the neck. In addition, Dr. Emery reports additional pain to the left lower back, which had not been present before the accident, along with tenderness over the right collarbone.

Dr. Emery then referred claimant to Dr. Dale D. Dalenberg, a physician who had seen claimant for an earlier work-related injury. Dr. Dalenberg recorded a history of an injury to the back of claimant's shoulders and the top of his head. Dr. Dalenberg opined that although claimant required an MRI to aid in his treatment, the MRI would not have been indicated but for the motor vehicle accident injury.[21]

Respondent sent claimant for an evaluation with Dr. Jeffrey T. MacMillan. Dr. MacMillan saw claimant on September 28, 2004. He indicates claimant disclosed an injury at the hands of a co-worker who hit him over the head with a 2x2 board.[22] There is no mention in this report of being struck on the back or about the shoulders. Dr. MacMillan indicates in his report that "[g]iven the extent of his [cervical] degenerative changes, if the blow that Mr. Young describes actually occurred, it could certainly set off some neck related symptoms." He goes on to state that "[i]t would be unlikely that such a blow would cause any injury to the low back."[23]

Based upon a review of the transcript as well as the ALJ's written Preliminary Decision, it appears the ALJ concluded claimant was injured in an accident that arose out of and in the course of his employment with respondent. He further found the "bare formal

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[19] *Id.,* Cl. Ex. 2.

[20] *Id.,* Resp. Ex. A.

[21] *Id.,* Cl. Ex. 4 at 2.

[22] *Id.,* Cl. Ex. 3 at 1.

[23] *Id.,* Cl. Ex. 3 at 3.

requirements of K.S.A. 44-518 [sic] as to notice of injury are apparent."[24] Thus, he ordered respondent to provide treatment with Dr. MacMillan, who was designated the treating physician.

After reviewing all the evidence offered by the parties, the Board finds that, by the barest of margins, claimant has established he sustained an accidental injury.

K.S.A. 2003 Supp. 44-508(d) defines "accident":

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2003 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

Here, there is no dispute that Mark McPherson struck claimant, at least once, by using a 2x2 oak board. The act was sudden and unintended as it relates to claimant and, even according to Dr. MacMillan, could aggravate claimant's preexisting cervical degenerative condition.

The Board is mindful that claimant's version of the events is problematic in that, claimant maintains he received at least two separate blows, but remained upright with his safety glasses falling off, his hard hat on his head, and yet was unconscious. Indeed, claimant has admitted lying on at least two occasions in connection with his unemployment claim. Moreover, the testimony and witness statements offered by respondent's employees portray an entirely different and totally harmless series of events. Nonetheless, even Mr. McPherson admits he "tapped" claimant's head on the date in question. This act, regardless of the intended result, constitutes an accident under the definition set forth above. Thus, the ALJ's conclusion that claimant sustained an accidental injury is affirmed.

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[24] ALJ Order (Oct. 1, 2004) at 1.

Respondent concedes claimant's accidental injury occurred in the course of his employment.[25] But it contends claimant has failed to establish any injury arose "out of" his employment. This argument stems from the fact that claimant was involved in an assault perpetrated by Mark McPherson, an individual who is not respondent's employee.

K.S.A. 44-501(a) states, in part:

> . . . In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Arising "out of" the employment is defined as follows:

> An injury arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment.[26]

The Board must next determine whether, under the facts and circumstances of this case, the injuries sustained by the claimant at work from an assault by an apparent co-worker are compensable. Fights between co-workers usually do not arise out of employment and generally will not be compensable.[27] If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.[28] For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,[29] or the employer had reason to anticipate that injury would result if the co-workers continued to work together.[30]

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[25] Respondent's Brief at 9 (filed Nov. 5, 2004).

[26] *Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973).

[27] *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

[28] See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[29] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[30] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

The greater weight of the evidence indicates the altercation between claimant and Mr. McPherson was initiated by an incident of claimant's employment, namely the accidental spilling of the grout mixture. Both parties agree that it was the spilled mixture on Mr. McPherson that led to his actions "tapping" claimant on the head. There was no evidence that Mr. McPherson's actions stemmed from any personal animosity against claimant. The Board finds there was very little evidence to suggest that respondent was aware that assaults or horseplay among its employees or those working with them occurred on the job site before April 16, 2004. Thus, the Board affirms the ALJ's finding that claimant's accidental injury arose out of his employment with respondent. For this reason, under these facts and circumstances it is unnecessary to get in to Mr. McPherson's motivation for the "tap".

The Board further affirms the ALJ's implicit conclusion that notice was sufficiently established. Claimant's supervisor admits he observed the "tap". Actual knowledge of the accident satisfies K.S.A. 44-520.

The more difficult issues relate to claimant's alleged present need for medical treatment and his request for temporary total disability benefits. The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

In the past the Board has held and continues to hold that it has jurisdiction to review preliminary findings regarding whether injuries are caused by work-related accidents or by intervening events. That issue is tantamount to deciding whether claimant has sustained personal injury by accident arising out of and in the course of employment.[31] The Board, therefore, concludes it has jurisdiction pursuant to K.S.A. 44-534a to consider this matter.

The facts of this case do not persuade the Board that claimant's present need for medical treatment are related to the "tap" on the head he sustained on April 16, 2004. Put simply, the facts of the events are not consistent with the proportionality of claimant's physical complaints. Claimant describes a rather violent assault that caused him to lose consciousness although he remained upright in a sitting position on the slope of a hill with his hard hat intact. In spite of his lack of consciousness, he purports to "know" that his supervisor saw this transpire and laughed. In stark contrast, the other witnesses to the event do not describe anything other than a playful maneuver. None of them saw claimant fall unconscious, nor did they hear him complain or observe him to be in pain following the "tap".

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[31] *See Anglemyer v. Woodland Health Center*, No. 265,290, 2001 WL 1399479 (Kan. WCAB Oct. 18, 2001).

Claimant's own actions following the event further call in to question his present need for treatment and its connection to the work-related versus nonwork-related events. Claimant says that he was in tremendous pain yet he was able to drive himself home over an hour away, and he sought no medical treatment for nearly two months. Even then, his treatment was from a chiropractor recommended by his attorney. Dr. MacMillan predicated his causation opinion on claimant's description of the accident. Given the claimant's admission that he has lied on at least two occasions in order to receive unemployment benefits, the Board is not persuaded by Dr. MacMillan's qualified opinion as to the causative link between claimant's present complaints of neck pain and his need for further treatment. Accordingly, the ALJ's preliminary decision granting medical treatment is reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[32]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Robert H. Foerschler dated October 1, 2004, is affirmed in part and reversed in part.

IT IS SO ORDERED.

Dated this _____ day of December, 2004.

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BOARD MEMBER

c: Gary A. Nelson, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[32] K.S.A. 44-534a(a)(2).